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IN THE

Supreme Court of the United States

October Term, 1977
No. 77-731

CITY OF PITTSBURGH,
Petitioner
vs.
GLENN R. MAHONE and
HARVEY L. MAHONE,
Respondents

On Petition for a Writ of Certiorari to
The United States Court of Appeals for
The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Did Respondents state a claim for violation of the "full and equal benefit of all laws and proceedings" and the "like punishment, pains, penalties . . . exactions of every kind" clauses of 42 U.S.C. §1981 by averments (a) that they were denied rights guaranteed by the Thirteenth and Fourteenth Amendments of the Constitution of the United States by a racially-motivated pattern of police misconduct in making arrests and processing charges against black citizens, as a result of which Respondents were physically assaulted and subjected to false arrests; and (b) that the responsible municipality failed to prevent such injustice by inade-

quately training, supervising, or disciplining said police officers, despite its prior knowledge of the racial animus and violent propensities of such police officers?

2. Is a municipal corporation exempt from liability under 42 U.S.C. §1981?

3. Do Respondents' averments state claims against Petitioner which are cognizable in federal courts under 28 U.S.C. §1331?

REASONS FOR DENYING THE PETITION

Petitioner urges three grounds for granting certiorari: It alleges 1) that there is a conflict between circuits on whether a municipality is subject to claims under 42 U.S.C. §1981, 2) that the court below has decided a matter of first impression in holding that Respondents' Complaint asserted a cause of action within the scope of 42 U.S.C. §1981, and 3) that the holding below is inconsistent with *Monroe v. Pape,* 365 U.S. 167 (1961).

For reasons set forth below, Respondents submit that the first and third of these assertions are incorrect and that the second does not, in the circumstances of this case, justify the grant of certiorari.

A. There Is No Conflict Between The Circuits

Petitioner incorrectly states that the decision below "is in direct conflict with a decision of the Fourth Circuit . . ." (Petition, p. 8). The Fourth Circuit decision is *Bennett v. Gravelle,* 451 F.2d 1011 (4th Cir. 1971), *cert. dismissed,* 407 U.S. 917 (1972), which was an action for racial discrimination in employment. The

Fourth Circuit affirmed a decision for the defendants on the basis of the opinion by the district court, *Bennett v. Gravelle,* 323 F.Supp. 203 (D. Md. 1971). The district court's decision involved two sets of plaintiffs: a group of 29 black and white public employees who had been discharged by defendants for engaging in an unlawful walkout; and a group of 5 current employees of defendants who intervened after the action had commenced. 323 F.Supp. at 205-06. The district court dismissed the claims of the group of discharged employees, holding that 42 U.S.C. §1981 was not violated by discharging public employees who engaged in a walkout prohibited by state law, even though the claimed purpose of the strike was to protest alleged racial discrimination. The district court specifically stated that because of its holding, it "need not, *as to these plaintiffs,* answer the defendants' other contentions."[1] 323 F.Supp. at 207 (emphasis added)

This was the only holding which came to the Court of Appeals for review. It did not have before it the claims of the *current* employees. The decision of the Court of Appeals specifically states, "This appeal is concerned only with the individual claims of the appealing plaintiffs" and identifies those plaintiffs as the employees discharged for the illegal walkout. 451 F.2d at 1012. Nowhere in its opinion does the court discuss

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1. One of these "other contentions" was that a municipality is not subject to liability under 42 U.S.C. §1981. The district court did address this contention in considering the claims of the *current* employees and concluded that in light of *Monroe v. Pape,* 365 U.S. 167 (1961), a municipality was not subject to liability under 42 U.S.C. §1981 "unless there is a clear showing that the government entity is susceptible to a state suit for damages." 323 F. Supp. at 216.

the question of municipal liability under 42 U.S.C. §1981. The Fourth Circuit, therefore, in affirming on the basis of the district court opinion, decided only that firing public employees who engage in a walkout prohibited by state law does not violate 42 U.S.C. §1981 even though the purpose of the walkout was to protest racial discrimination.

It is clear, therefore, that in *Bennett* the Fourth Circuit did not, as claimed by Petitioner, rule on the issue of municipal liability under 42 U.S.C. §1981.[2]

Petitioner does not cite and Respondents are not aware of any Court of Appeals decision not subsequently overruled which is in conflict with the decision below.[3]

The Fifth, Seventh and Ninth Circuits have held that municipalities are liable under 42 U.S.C. §1981 in actions for racial discrimination in employment. *Campbell v. Gasden County District School Board,* 534 F.2d 650 (5th Cir. 1976); *United States v. City of Chicago,* 549 F.2d 415 (7th Cir. 1977); *Sethy v. Almeda County Water District,* 545 F.2d 1157 (9th Cir. 1976) (en banc). Each of these Circuits, in accord with the Third Circuit

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2. This has been recognized, at least by implication, even by the District Court which had decided *Bennett.* In a later case, it held that a municipality could be held liable under 42 U.S.C. § 1981 for racially-motivated police brutality: *Raffety v. Prince George's County,* 423 F. Supp. 1045, 1058-62 (D. Md. 1976).

3. Every Court of Appeals decision refusing to hold municipalities liable under 42 U.S.C. §1981 has been overruled. See *Sethy v. Almeda County Water District,* 545 F.2d 1157 (9th Cir. 1976) (en banc) (overruling one prior decision); *United States v. City of Chicago,* 549 F.2d 415, 425 (7th Cir. 1977) (overruling two prior decisions).

in the case at bar, rejects the arguments regarding municipal immunity advanced by Petitioner.

B. THIS CASE IS NOT "RIPE" FOR REVIEW.

Petitioner also seeks to justify review on certiorari by asserting that the issues involved in the present case are "essentially one of first impression." (Petition p. 16).[4]

Where a lower court has decided an important question of federal law which has not been settled by the Supreme Court, certiorari is normally granted only (1) if the question is unlikely to be clarified by further litigation in lower federal courts or (2) if an immediate consideration of the question by the Supreme Court is necessary in the public interest. See Hart & Wechsler, *The Federal Courts And The Federal System* (2d Ed.) p. 1628. The paucity of decisions of lower federal courts or any by this Court exploring the scope and purpose of the "full and equal benefits" and "like punishment" clauses of 42 U.S.C. §1981 is a reason for deferring the examination of the issue in this Court until the matter can be explored in the lower federal court system.

One possible effect of the decision of the court below will be to stimulate analysis of the question in other cases now pending or which may be filed in other federal courts. This Court's certiorari policy suggests that, in these circumstances, the better course is to wait until the lower federal courts have had the opportunity fully to explore all relevant considerations.

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4. Actually, there have been two district court holdings that similar allegations do state claims under 42 U.S.C. §1981. *Raffety v. Prince George's County,* 423 F. Supp. 1045 (D. Md. 1976); *Maybanks v. Ingraham,* 378 F. Supp. 913 (E.D. Pa. 1974).

A further reason for denying review at this time is the procedural posture of the present case. The case against Petitioner came before the Court of Appeals only because of the entry of final judgment in favor of the city under F.R.C.P. 54(b). Even the Court of Appeals did not determine all the issues involved in the case. In reversing the district court's dismissal and remanding the proceedings to the district court for trial, the Court of Appeals decided only the issues presented by Respondents' 42 U.S.C. §1981 claims. It did not decide whether Respondents' state law claims against Petitioner are within the pendent jurisdiction of the federal court, leaving this issue to be decided by the district court on remand. In addition, the Court of Appeals concluded that it was not necessary for it to decide whether Respondents' claims were within the jurisdiction of the federal courts under 28 U.S.C. 1331.

The procedural posture of this case, therefore, is that the case must go back to the district court for trial of the §1981 claim and, possibly the state law claims against Petitioner, as well as for trial of all claims against the individual defendants. Even if this Court were to grant certiorari and reverse the decision below, it is likely that the Court of Appeals (and indeed perhaps this Court) would ultimately be asked to determine whether Respondents have stated claims against Petitioner under the Thirteenth and Fourteenth Amendments which are cognizable under 28 U.S.C. §1331. Review of these varied but related issues, if ever a proper matter to be brought before this Court in this case, should be deferred until final determination of this case on the merits by the lower federal courts. Such determination, if made on the pendent state law grounds, for example, could make unnecessary a determination

by this Court of the 42 U.S.C. §1981 questions now tendered by Petitioner.

Respondents do feel, however, that the court below correctly held that the averments in Respondents' Amended Complaint were sufficient to state a claim under 42 U.S.C. §1981. Originally enacted by Congress in 1866 to fulfill the promise of the Thirteenth Amendment, this Act is a remedial statute of broad spectrum, designed to obliterate forever all badges and incidents of slavery. *Jones v. Mayer Co.,* 392 U.S. 409 (1968). In *Jones,* Mr. Justice Stewart, in the opinion of the court, pointed out that the Congress, in enacting the Civil Rights Act of 1866, was moved by the objective of giving real content to the freedom guaranteed by the Thirteenth Amendment, citing, with approval, the following remarks of Representative Thayer of Pennsylvania in the course of the congressional debates:

> "The bill which now engages the attention of the House has for its object to carry out and guaranty the reality of . . . (the Thirteenth Amendment). . . . It is to give to it practical effect and force. It is to prevent that great measure from remaining a dead letter upon the constitutional page of this country. . . . *The practical question now to be decided is whether they shall be in fact freemen. It is whether they shall have the benefit of this great charter of liberty* given to them by the American people." (Emphasis by the court.)

Surely for a municipality to ignore a pattern of racially-motivated police misconduct which resulted in physical assaults and false arrests of black citizens would have been considered even in 1866 as a denial to the black citizens of such community of "the full and

equal benefit of all laws and proceedings for the security of persons and property" and to subject such black citizens to "punishment, pains, penalties . . . and exactions" unlike those faced by white citizens of the community.

As stated in *Raffety v. Prince George's County, supra,* at 423 F. Supp. page 1062:

> ". . . Notwithstanding a lack of judicial precedent, this court believes that one's rights under this section are violated by a racially motivated detention, interrogation, and investigation by police officers. A contrary holding would relegate the above language . . . (of §1981) . . . to meaningless phraseology. . . ."

C. THE IMPOSITION OF LIABILITY AGAINST A MUNICIPAL CORPORATION UNDER 42 U.S.C. §1981 IS NOT INCONSISTENT WITH MONROE V. PAPE.

Petitioner also contends that the ruling below is inconsistent with this Court's holding in *Monroe v. Pape,* 365 U.S. 167 (1961). This contention cannot stand analysis of the legislative history and constitutional underpinnings of 42 U.S.C. §1981.

Monroe v. Pape held that liability could not be imposed upon a municipality under 42 U.S.C. §1983. The Court studied the legislative history of §1983, which is derived from the Civil Rights Act of 1871, and concluded that Congress intended that municipal corporations not be included within the scope of the word "person." 42 U.S.C. §1981, however, is derived from the Civil Rights Act of 1866. It is intended to enforce and assure the guaranty of the Thirteenth Amendment. This Court has recognized that this distinct legislative history and constitutional basis requires that §1981 not be subject to

the same limitations as under 42 U.S.C. §1983. See eg. *Runyon v. McCrary,* 427 U.S. 160 (1976); *Cf. District of Columbia v. Carter,* 409 U.S. 418 (1973).

There is nothing in the legislative history nor in the language of 42 U.S.C. §1981 to justify excluding Petitioner from its scope. Such an exclusion would frustrate the mandate of the Thirteenth Amendment and the intent of Congress to obliterate forever all badges and incidents of slavery. *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 439-43 (1968).

CONCLUSION

For the above reasons, the Petition for a Writ of Certiorari should be denied.

Respondents suggest, however, that if certiorari is granted, a fair adjudication of the case and a proper resolution of the legal issues it involves for the guidance of lower federal courts would require that this Court also consider the 28 U.S.C. §1331 issue which was not decided by the Court of Appeals.

Respectfully submitted,

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